Supreme Court, U.S.
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No. 00-

In the Supreme Court of the United States

CUSTOM FOOD MACHINERY, INC. and RON MCNIEL, SR.,

Petitioners,

v.

MARIA TERESA DE SARACHO, EUREKA CANNERS GROUP, S.A. and EUREKA MEXICANA, S.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS V. LORAN III
Counsel of Record
CRAIG E. STEWART
Pillsbury Madison & Sutro LLP
50 Fremont Street
San Francisco, CA 94105
415-983-1000

Counsel for Petitioners

HSPP

QUESTION PRESENTED

Judgment in the amount of $12.5 million was entered on a jury verdict against petitioners, an individual and his privately owned corporation. The amount of the verdict was based on testimony by an accounting expert that was indisputably wrong and resulted in an undeniable $6 million windfall to the plaintiffs. The United States Court of Appeals for the Ninth Circuit upheld the district court's admission of this testimony under Rule 703 of the Federal Rules of Evidence over petitioners' objection to its lack of reliability. In conflict with the decisions of other circuit court of appeals that have considered the issue since this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Ninth Circuit ruled that for purposes of admissibility, it was enough that the accountant, in forming his opinion, had relied on information of a type on which accountants customarily rely. Thus, the following question is presented:

> Whether a challenge to the reliability of the bases for an expert opinion under Rule 703 requires not only that the proponent of the evidence satisfy the court that the facts, data or opinions considered by the expert are of the type customarily relied upon by experts in the field but also that such items are sufficiently trustworthy to make such reliance reasonable in the particular case.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners Custom Food Machinery, Inc. and Ron McNiel, Sr. were defendants and appellants in the courts below. Respondents Maria Teresa De Saracho, Eureka Canners Group, S.A. and Eureka Mexicana, S.A. were plaintiffs and appellees. Fred Avalli was a defendant and appellant in the courts below.

Pursuant to Supreme Court Rule 29.6, petitioner Custom Food Machinery, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

I. Certiorari Should Be Granted to Resolve the Split in the Circuits Regarding the Court's Duty to Determine Whether the Particular Data on Which the Expert Relies are Reliable. 6

II. The Ninth Circuit's Decision Is an Abdication of the Court's Gatekeeping Function and Has Produced a Serious Miscarriage of Justice. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Bradley v. Armstrong Rubber Co., 130 F.3d 168 (5th Cir. 1997) 4

Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993) ..... passim

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 11

Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) 9

Guillory v. Domtar Industries Inc., 95 F.3d 1320 (5th Cir. 1996) 8, 14

Head v. Lithonia Corp., 881 F.2d 941 (10th Cir. 1989) 9

In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987) 7

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574 (1986) 12

In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717 (3d. Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) 7, 10, 12

In re TMI Litigation, 193 F.3d 613 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 2238 (2000) 8

Manniano v. Int'l Mfg., 650 F.2d 846 (6th Cir. 1981) 10

Mapco, Inc. v. Carter, 573 F.2d 1268 (TECA), *cert. denied*, 437 U.S. 904 (1978) 10

Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992) 9

TABLE OF AUTHORITIES (continued)

Page(s)

Sementilli v. Trinidad Corp., 155 F.3d 1130 (9th Cir. 1998) 11

Shaw by Strain v. Strackhouse, 920 F.2d 1135 (3d Cir. 1990) 14

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990) 8

Trepel v. Roadway Express, 194 F.3d 708 (6th Cir. 1999) 10

United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997) 4, 8

United States v. Corey, 207 F.3d 84 (1st Cir. 2000) 9

United States v. Locascio, 6 F.3d 924 (2d Cir. 1994), *cert. denied*, 511 U.S 1070 (1994) 8

Washington v. Armstrong World Industries, Inc., 839 F.2d 1121 (5th Cir. 1988) 10

Statutes and Codes:

Title 28, United States Code
Section 1257(a) 1
Section 1332 2

Rules:

Federal Rules of Evidence
Rule 104(a) 11, 13
Rule 702 ..... 5, 12
Rule 703 ..... passim

TABLE OF AUTHORITIES (continued)

Page(s)

Other Authorities:

2 M. H. Graham, *Handbook of Federal Evidence*, § 703.1 (4th ed. 1996) 6, 10, 13

3 Mueller & Kirkpatrick, *Federal Evidence* § 357 (2d ed. 1994) 13

Advisory Committee Notes, Rule 803 (1972 Proposed Rules) 6

Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. Rev. 53 (1994) 6, 12

Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 Mercer F. Rev. 477 (1996) 13

PETITION FOR A WRIT OF CERTIORARI

Custom Food Machinery, Inc. and Ron McNiel, Sr. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-13a) is reported at 206 F.3d 874 (9 Cir. 2000). The relevant opinion and orders of the United States District Court for the Northern District of California (App. 14a-21a) are unreported.

JURISDICTION

The Ninth Circuit's final judgment was entered on March 3, 2000. The petition for rehearing timely filed by petitioners was denied on April 17, 2000. App. 22a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 703 of the Federal Rules of Evidence provides as follows:

> The facts or data in the particular case on which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

This is an action brought by a Mexican company, Eureka Canners Croup, S.A. ("ECG"), and two of its minority shareholders, Maria Teresa De Saracho ("Maria") and her family's corporation Eureka Mexicana, S.A. ("Mexicana"). Reporter's Transcript ("RT") 358-59, 377-79, 915-17. Maria and her husband Cesar De Saracho formed ECG with defendant Fred Avalli ("Avalli") in August 1993 for the purpose of starting a tomato canning and processing plant in Culiacan, Sinaloa, Mexico. RT 332-34. Petitioner Custom Food Machinery, Inc. ("CFM") sold ECG food processing equipment to be used at the plant.

Plaintiffs filed this diversity action (28 U.S.C. § 1332) against Avalli and petitioners in 1995 alleging claims for fraud, conspiracy to defraud and breach of fiduciary duty. Plaintiffs alleged that they had been defrauded in two principal respects: (1) that they were led to believe that Avalli had made a $1,050,000 capital contribution to ECG that Avalli never made; and (2) that they were led to believe ECG was purchasing from CFM fully guaranteed food processing equipment worth $2.15 million, when in fact ECG paid only $1.1 million for equipment sold "as-is" and without warranty.

As a result of this alleged fraud, plaintiffs claimed that ECG's canning business collapsed, causing ECG to default on loans to a Mexican bank (BanRural). Plaintiffs themselves claimed not to know how much they owed BanRural, but their expert Stephen Degnan testified, over objection, that ECG's liability on the BanRural loans was nearly $11.4 million at the time of trial. RT 1705.[1] In closing argument, plaintiffs' counsel asked the jury to award approximately $15.7 million in

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[1] At trial, the defendants objected contemporaneously to the proffered expert testimony and also made a motion to strike after its erroneous admission. App. 16a-21a.

damages to plaintiffs--$11.4 million for plaintiffs' alleged liability to BanRural and $4.3 million for lost profits and other damages. RT 3275-79. The jury returned a verdict against petitioners for $12,516,000. App. 14a-15a.[2]

Thus, the judgment was necessarily based on the expert testimony concerning the BanRural loans, which comprised plaintiffs' major element of damages. Their expert arrived at his $11.4 million figure by taking the amount due on ECG's three loans as of April 7, 1995 (as shown on notices of default issued by BanRural) and adding purported "default" interest to those amounts to bring them current through the time of trial. RT 1704; ER 1511, 1558-77. The expert testified, based on the written loan agreements between the bank and ECG, that the appropriate "default" interest rate was 1.5 times the higher of two peso reference rates--BanRural's costs of funds and the Mexican T-bill rate. ER 1511; RT 1695, 1697-1703. Using this methodology, plaintiffs' expert opined that the bank charged post-defaults rates of interest ranging from 41-90%. RT 1702-03. The highest interest rate computed—90.59%—was for the second quarter of 1995 beginning on April 8. RT 1704.

In fact, the expert's testimony was wildly inaccurate, having been based on assumptions as to the applicable interest rate that were indisputably wrong and inconsistent with BanRural's actual practices. Rather than the expert's super-usurious rates, the bank itself claimed post-default interest as of April 7, 1995 at rates of only 23.7% and 22.5% on two of the loans. ER 1564, 1572. Interest on the third loan on that date was charged at the non-default rate of 13.5%. ER 1558. Moreover,

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[2] Judgment likewise was entered against Avalli for $12,516,000. *Id.* The jury also found that Avalli had acted with oppression, fraud or malice, but that petitioners had not. Excerpts of Record ("ER") 191.

in post-judgment motions, petitioners presented BanRural's response to letters rogatory and an affidavit by the responsible bank officer attesting that, as of six months after trial, the amount of the debt was less than $5.5 million. See ER 280:10-12, 281:22-28, 416, 483, 1242-46. Thus, the judgment represents an undeniable windfall to plaintiffs of $6 million.

On appeal to the Ninth Circuit, petitioners argued that, pursuant to Rule 703 of the Federal Rules of Evidence, the district court should have sustained their objection and motion to strike the expert's testimony on the ground that its unreliability violated basic rules of admissibility. In a 2-to-1 decision, the court of appeals rejected petitioners' challenge to admission of the erroneous expert testimony.

The panel opinion invoked Rule 703 and approved of the expert's reliance on the loan agreements to generate his erroneous testimony. The court evaluated admissibility solely on the basis of custom in the field of accountancy: "[i]t is common sense that certified public accountants reasonably rely on loan agreements to calculate the interest due on loans." App. 8a. The dissent recognized, however, that it was manifestly erroneous for the district court to overrule defendants' objection, reasoning that "[e]xpert testimony based on incorrect underlying facts should be excluded" (citing *United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) and *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 177 (5th Cir. 1997)). App. 13a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a pervasive conflict in the circuit courts of appeals regarding the standard for admission of expert testimony under Rule 703 of the Federal Rules of Evidence. The Court has yet to address this important question. Until it does, resolution of the issue—on which the outcome in many

cases hinges—will depend on the circuit in which the action is filed.

The question presented in this case involves the Rule 703 standard that should apply to the underlying data on which expert opinion testimony is based. The majority of courts considering this issue have held that the test for admission of opinion evidence is two-pronged. First, the proponent must present evidence that the opinion is based on the general types of underlying facts, information or data on which experts in the field customarily rely. Second, the district court must be satisfied that the particular information supporting the opinion is sufficiently reliable to permit admission of the expert's testimony. Most of the recent decisions following the majority approach have relied on the Court's reasoning in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[3]

Because *Daubert* does not dispose of the issue presented under Rule 703, some circuit courts of appeals, including the Ninth Circuit below, continue to follow a less stringent approach to the admission of opinion testimony under Rule 703. According to the minority approach followed by the Sixth and Ninth Circuits, expert testimony is admissible under Rule 703 so long as the foundational data for the expert's opinion are of the general sort on which other experts customarily rely. Thus, as in this case, expert testimony is admitted without any inquiry into the reliability of the actual underlying information on which the opinion is based.

Scholarly authorities have recognized the split in the circuits and support adoption of the more restrictive

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[3] *Daubert* involved a related question arising under Rule 702: whether expert opinion based on scientific technique is inadmissible unless the technique is "generally accepted" as reliable within the relevant scientific community.

approach. *See, e.g.*, Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. Rev. 53, 75-76 (1994). This conclusion is based, at least in part, on the recognition that the competing liberal approach to evaluation of the foundation for expert testimony is unprincipled, transfers control of the admissibility of evidence to the expert and creates the potential for errors in the adjudicative process. *See id.* at 77. It also is inconsistent with the overriding concept of the Federal Rules of Evidence that, to be admissible, evidence must possess sufficient circumstantial guarantees of trustworthiness and reliability. *See generally* Advisory Committee Notes, Rule 803 (1972 Proposed Rules); 2 M. H. Graham, *Handbook of Federal Evidence*, § 703.1, pp. 103-09 & n.17 (4th ed. 1996).

This case presents a stark illustration. The Ninth Circuit upheld admission of the opinion of plaintiffs' expert that, based on the application of super-usurious interest rates supposedly dictated by loan document formulae, the amount due on the BanRural loans had mushroomed at the time of trial to nearly $11.4 million. The district court admitted this testimony despite the evidence in the record reflecting that the bank itself had not charged interest at the rates that formed the basis for the expert's opinion. Contrary to the Ninth Circuit's conclusion (App. at 8a-9a, fn. 5), such expert testimony could not create a factual issue for the jury. This Court should grant certiorari and rule that the district judge should have excluded the opinion under Rule 703 and remand the case for a new trial.

I. Certiorari Should Be Granted to Resolve the Split in the Circuits Regarding the Court's Duty to Determine Whether the Particular Data on Which the Expert Relies are Reliable.

The circuits are divided over whether Federal Rule of Evidence 703 requires a trial judge to assess independently the reliability of the bases of an expert

opinion. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1243-44 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987) (describing the two approaches: "The more restrictive view requires the trial court to determine not only whether the underlying data are reasonably relied upon by experts in the field, but also whether the underlying data are untrustworthy for hearsay or other reasons. The more liberal view ... allows the expert to base an opinion on data of the type reasonably relied upon by experts in the field without separately determining the trustworthiness of the particular data involved." (citations omitted)). The Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits apply the more rigorous restrictive approach, while the Sixth and Ninth Circuits apply the unprincipled, liberal approach.

Under the restrictive approach to Rule 703, courts require not only that the underlying facts, opinions or data be of a type on which experts in the field customarily rely, but also that such items be sufficiently trustworthy to make such reliance reasonable in a particular case. This two-step approach is best illustrated by the Third Circuit's opinion *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d. Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). The Third Circuit ruled that the admissibility of expert testimony under Rule 703 cannot rest on a finding merely that the expert's opinion conforms to accepted standards within the relevant field:

> [w]e now make it clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data reasonably relied upon by experts, the judge must conduct an independent evaluation into reasonableness. . . . [T]here must be good grounds on which to find the data reliable.

Id. at 748; *see also In re TMI Litigation*, 193 F.3d 613, 697 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 2238 (2000) ("If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded. The key inquiry is reasonable reliance and that inquiry dictates that the trial judge must conduct an independent evaluation into reasonableness. . . . [T]here must be good grounds on which to find the data reliable."(citations omitted)). Likewise applying the restrictive approach, the Fifth Circuit has held that "though the district court serves as a gatekeeper for expert evidence, it is an important role designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all." *Guillory v. Domtar Industries Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996); *see also Slaughter v. Southern Talc Co.*, 919 F.2d 304, 306-07 (5th Cir. 1990) (finding that despite the fact that the expert's methods were widely accepted in the medical community, Rule 703 "requires courts to examine the reliability of an expert's sources to determine whether they satisfy the threshold established by the rule").

Other circuits also have announced the requirement that district courts must conduct independent review of the trustworthiness of an expert's particular bases for opinion before admitting it. *See, e.g., United States v. City of Miami*, 115 F.3d at 873-74 (observing that "opinions derived from erroneous data are appropriately excluded" and finding that the lower court erred in adopting expert testimony that "did not examine legally relevant factors and was derived from erroneous data"); *United States v. Locascio,* 6 F.3d 924, 938 (2d Cir.), *cert. denied*, 511 U.S 1070 (1994) (stating that the trial court is "not bound to accept expert testimony based on questionable data simply because other experts use such data in the field"); *Renaud v. Martin Marietta Corp.*, 972 F.2d 304, 308 (10th Cir. 1992) (finding that the

district court "had an independent duty . . . to decide whether the single data point supported the admissibility of the conclusions [the experts] sought to draw therefrom . . . [and that] pursuant to the Fed.R.Evid. 703, the District Court has the responsibility of evaluating the trustworthiness of the factual basis upon which an expert witness relies"); *Gong v. Hirsch*, 913 F.2d 1269, 1272-73 (7th Cir. 1990) (concluding that despite finding that observations by staff personnel were a type of information reasonably relied upon by experts in the field, obvious concerns about lack of trustworthiness of the particular data were sufficient to have warranted exclusion of the opinion testimony); *Head v. Lithonia Corp.*, 881 F.2d 941, 943 (10th Cir. 1989) ("The limitation that the facts and data be the type reasonably relied upon by experts in the field provides a mechanism by which the court can evaluate the trustworthiness of the underlying data on which the expert relies." (citations omitted)).[4]

In sharp contrast to these decisions applying the more restrictive standard, the Ninth Circuit in this case approved of the district court's failure to make an independent assessment of the trustworthiness of the data on which the expert relied (and, hence, the reasonableness of such reliance). In response to petitioners' challenge to the lack of reliability of those underlying data, the majority opinion below stated that "[i]t is common sense that certified public accountants reasonably rely on loan agreements to calculate the interest due on loans." App. 8a. Thus, according to the Ninth Circuit, the district court had no obligation to determine whether the expert's reliance on the loan

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[4] *Cf. United States v. Corey*, 207 F.3d 84, 89 (1st Cir. 2000) (stating that "Rule 703 does require that the trial judge act as an independent 'gatekeeper' to ensure that there is sufficient, credible evidence that experts do rely on the specified types of sources in formulating their opinions").

agreements was reasonable under the circumstances of this case. Instead, the appellate court erroneously concluded that this simply presented a jury issue. App. 8a-9a, fn. 5.[5] As a result, the court approved of the admission of highly prejudicial evidence as to the amount of the BanRural indebtedness—opinion testimony that was indisputably incorrect.

Characterized by an unyielding faith in the expert, the Ninth Circuit's liberal approach leaves questions about the reliability of the evidence to the cross-examination skills of opposing counsel and the absolute wisdom of the jury. Joining the Ninth Circuit, the Sixth Circuit also applies the liberal approach, stating "[g]reat liberality is allowed the expert in determining the basis of his opinion under Rule 703." *Manniano v. Int'l Mfg.*, 650 F.2d 846, 853 (6th Cir. 1981). The more restrictive two-step assessment of expert evidence has gained acceptance in the Sixth and Ninth Circuits only in dissenting opinions. *See, e.g., Trepel v. Roadway Express*, 194 F.3d 708, 722 (6th Cir. 1999) (Suhrheinrich, J., dissenting in part) ("By

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[5] Judicial and scholarly authorities are unanimous that the admission of expert opinion testimony under Rule 703 presents a preliminary question for the court to determine pursuant to Rule 104(a). *See, e.g., In re Paoli*, 35 F.3d at 748; *see also* 2 M. H. Graham, *supra*, § 703.1, p. 103. Moreover, no reasonable juror in this case could have concluded that, as plaintiffs' expert opined, the bank was actually demanding more interest than what its contemporaneous documents said it was demanding. The notices stating the interest rate that BanRural was actually assessing were undisputed and indisputable, and demonstrably erroneous expert testimony cannot create a factual conflict. *E.g., Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988) (inadmissible expert affidavit cannot raise genuine issue of material fact to defeat summary judgment motion); *Mapco, Inc. v. Carter*, 573 F.2d 1268, 1282 (Temp. Emer. Ct. App.), *cert. denied*, 437 U.S. 904 (1978) (same).

ensuring that an expert's opinion is based on reliable information, the courts prevent the abuse of expert testimony by those who seek to use experts as a pretense for the admission of otherwise inadmissible and unreliable hearsay."); *Sementilli v. Trinidad Corp.*, 155 F.3d 1130 (9th Cir. 1998) (B. Fletcher, J., dissenting) (noting that the Supreme Court's holding in *Daubert* stressed that "in ruling on admissibility, trial judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony" (citations omitted)).

The restrictive approach is consistent with this Court's reasoning in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Court considered whether scientific expert testimony, to be admissible under Rule 702, has to be based on scientific techniques "generally accepted" by experts within the field. The Court answered this question in the negative, ruling that the "uncompromising 'general acceptance' test" first developed in *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir. 1923), was not the touchstone under Rule 702. 509 U.S. at 596. Rather, the Court held in *Daubert* that scientific opinion testimony is admissible as long as the trial judge makes a preliminary determination, in accordance with Rule 104(a), that the proffered testimony (1) has sufficient indicia of scientific validity and reliability and (2) will assist the trier of fact to understand or determine a fact in issue. *Id.* at 592-95.

Daubert also emphasized the critical role of the trial judge in controlling the admission of expert testimony under the Federal Rules of Evidence. 509 U.S. at 589-90. The "gatekeeping role for the judge" (*id.* at 597), for example, was this Court's answer in *Daubert* to the argument that abandonment of "general acceptance" as the exclusive requirement for admission of scientific opinions would "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational

pseudoscientific assertions." *Id.* at 595. In reliance on this language in *Daubert*, the Third Circuit in *In re Paoli*, 35 F.3d at 748, disavowed its adherence to the liberal approach to the admissibility of expert testimony under Rule 703, overruling its holding in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 276 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574 (1986).[6]

Daubert, however, does not resolve the conflict in the circuits as to the proper test under Rule 703. Although in *Daubert* this Court did offer "some general observations" about the district court's gatekeeping role (509 U.S. at 593), it did not endorse the restrictive approach adopted by the majority of courts and did not decide the question of the admissibility of expert opinion testimony under Rule 703 based on the nature of the underlying, facts, data and information supporting the opinion. Thus, even after of *Daubert*, the Ninth Circuit in this case failed to impose any duty on the trial judge to make a preliminary assessment of the trustworthiness of the particular data on which the expert relied. Certiorari therefore should be granted to give needed guidance on an important issue having broad practical implications in virtually all trials conducted in federal courts.

Academic authority has recognized the conflict between the circuits and the need for uniformity and has encouraged adoption of the restrictive approach. *See, e.g.*, Epps, *supra*, 36 B.C. L. Rev. at 84 ("Rule 703 has been misunderstood and misapplied during it's twenty

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[6] Whereas in *In re Japanese Products*, the Third Circuit had stated that under Rule 703, "[t]he proper inquiry is not what the court deems reliable, but what the experts in the relevant discipline deem it to be" (723 F.2d. at 276), the court now has concluded that after *Daubert*, the judge's role as gatekeeper is to determine whether the data underlying an expert opinion are reliable. *See In re Paoli*, 35 F.3d at 748.

year history."); Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 Mercer F. Rev. 477, 464 (1996) (calling for courts to effectively resolve the splits in authority by defining the scope of Rule 703). The academic world has largely taken the position that the restrictive approach is properly applied. *See, e.g.*, 2 M. H. Graham, *supra,* § 703.1, p. 105, fn. 14 ("The proper role of the trial judge in determining whether reliance is reasonable is still subject to occasional dispute although the so-called restrictive approach correctly clearly dominates."); 3 Mueller & Kirkpatrick, *Federal Evidence* § 357 (2d ed. 1994) (recognizing the dual standard yet noting that it is "inconceivable that the courts should defer completely to experts"). Indeed, as articulated by one of the leading commentators, Rule 703 mandates application of the more stringent, two-pronged test:

> [T]he proponent of the evidence must satisfy the court, both that . . . [the facts, data or opinions] are of the type customarily relied upon by experts in the field and that such items are sufficiently trustworthy to make such reliance reasonable.

2 M. H. Graham, *supra*, § 703.1, p. 105 (footnotes omitted).

For the expert testimony here to be admissible over petitioners' objection to its reliability, it was not enough that certified public accountants customarily rely on loan documents in determining the amount of interest due on loans. Rather, it was also necessary that those sources of information were sufficiently reliable here to make the expert's reliance on them reasonable.

II. The Ninth Circuit's Decision Is an Abdication of the Court's Gatekeeping Function and Has Produced a Serious Miscarriage of Justice.

Plaintiffs did not seriously contend below that ECG actually owed BanRural $11,395,000 in May 1997, as their expert testified. To the contrary, the expert's assumptions as to the interest rates effective in April 1995 were undeniably incorrect and directly refuted by the record evidence (i.e., the interest rates actually charged by the bank at that time). Therefore, as the dissent recognized (App. 12a-13a), it was manifestly erroneous for the district court to overrule defendants' objection. *See, e.g., Guillory v. Domtar Industries, Inc.*, 95 F.3d at 1331 ("[N]othing in Rule 703 requires a court to admit an [expert] opinion based on facts that are indisputably wrong."); *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990) (trial court properly disregarded expert's conclusion that rested on assumption shown contrary to facts of record).

Had the Ninth Circuit followed the correct, more restrictive approach, it would have reached the correct result and excluded the fanciful opinion offered by plaintiffs' accounting expert. As to the first prong of the test, the majority opinion below is correct (App. at 8a): loan documents are among the general types of information on which accountants rely to determine the amount of interest due on loans. The underlying data supporting the opinion, however, did not meet the second component of the test for admissibility under Rule 703. The record reflects the dramatic and unexplained disparity between the expert's interest rate assumptions based on the loan documents and the evidence reflecting the bank's actual practices with respect to computing interest. As a result, the district court should have sustained petitioners' objection to the lack of reliability of the data underlying the expert's opinion, and the court of appeals should have reversed

the trial judge's failure to exclude this highly prejudicial testimony.

This result is consistent with *Daubert* and proper as a matter of policy. The trial judge should have exercised a gatekeeping role under Rule 703 to evaluate the reasonableness and reliability of the data on which plaintiffs' expert relied. This is what is envisioned by *Daubert* and mandated by the majority of the court of appeals decisions, which apply the proper approach. The expert's testimony was indisputably wrong and its exclusion would have avoided an undeniable $6 million windfall. Under Rule 703, trial courts must refuse to admit expert testimony, such as that proffered below, that is premised on underlying data and information that lack sufficient guarantees of reliability and trustworthiness. It is not proper to leave it up to the expert or the jury to sort through such preliminary issues. Until this Court addresses the issue, however, the lower courts will be free to follow the liberal, unprincipled approach, which creates the potential for irrational results of the type that occurred here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS V. LORAN III
Counsel of Record
CRAIG E. STEWART
Pillsbury Madison
& Sutro LLP
50 Fremont Street
San Francisco, CA 94105
415-983-1000

Counsel for Petitioners

July 2000